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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN L. LLOYD,

Defendant and Appellant.

B203359

(Los Angeles County  
Super. Ct. No. BA319498)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Anne H. Eggerton, Judge. Affirmed in part and reversed in part.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted John L. Lloyd (appellant) of possessing base cocaine. (Health & Saf. Code, § 11350, subd. (a).)<sup>1</sup> In bifurcated proceedings, the jury found true that appellant had suffered five prior felony convictions, three of which were alleged as prior convictions requiring sentencing pursuant to the “Three Strikes” law (Pen. Code, §§ 667, subds. (b)-(i); 1170.12)<sup>2</sup> and four of which had no five-year wash-out period and potentially were the predicates for the service of separate prison term enhancements (Pen. Code, § 667.5, subd. (b)). The trial court denied appellant’s motion pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), which requested that he be sentenced as a first-time offender and be granted probation. The trial court sentenced appellant as a second-strike offender.

He appeals from the judgment and contends that the trial court abused its discretion in denying his *Romero* motion.

We will order a remand for formal findings on the strikes and enhancements, for reconsideration of appellant’s *Romero* motion, and for resentencing. In all other respects, the judgment will be affirmed.<sup>3</sup>

## FACTS

### I. The Trial Evidence

On March 23, 2007, two Los Angeles police officers saw appellant and a woman walking into the parking lot of a library. Appellant and the woman disappeared from sight, and the officers walked into the parking lot to look for them. The officers found

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<sup>1</sup> Appellant was also convicted of a misdemeanor offense, possession of drug paraphernalia. (Health & Saf. Code, § 11364.) After sentencing, the trial court dismissed this conviction at the request of the prosecutor.

<sup>2</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>3</sup> On July 23, 2008, appellant personally filed a petition for a writ of habeas corpus. (*In re John L. Lloyd*, B209487.) On July 29, 2008, we ordered the petition to be considered concurrently with the appeal. The petition will be disposed of by a separate order.

appellant and his companion huddled together between a wall and a dumpster. When appellant noticed the officers, he quickly dropped a small item into his coat pocket. Appellant was detained. One officer patted appellant down for weapons and found a crack pipe in his pants pocket. The officer arrested appellant. In appellant's coat pocket, the officer found 0.33 grams net of base cocaine contained within a small plastic bindle.

In defense, appellant denied that he had the base cocaine in his pocket. However, he admitted smoking base cocaine with his companion shortly before the officers arrived.

## **II. The *Romero* Motion and Sentencing**

### ***A. Appellant's Criminal History***

The probation report disclosed that at sentencing appellant was 48 years old. He had the following criminal history. As a juvenile, he had numerous contacts with the police, including contacts for robbery and felonious assault. He had been committed to camp and to the California Youth Authority (CYA). In March 1971, he was discharged from CYA parole.

As an adult, in 1971, appellant was convicted of second degree burglary and was committed to state prison. (San Luis Obispo County case No. 7267.) After a 1977 prison discharge, in 1978, he was convicted of misdemeanor battery and granted probation. In 1980, he was convicted of receiving stolen property and granted probation. In 1981, in two different cases, he was convicted of defrauding an innkeeper and of felony grand theft and granted probation. In 1983, he was convicted of a violation of Vehicle Code section 10851 and granted probation. In 1985, he was convicted of assault with a firearm (§ 245, subd. (a)(2)) and granted probation. (Los Angeles County case No. A091718.) In 1986, in two different cases, he was convicted of giving false identification information to a police officer and of kidnapping and felonious assault (§§ 207, 245, subd. (a)(1)). After his kidnapping conviction, he was committed to state prison for 13 years. (Los Angeles County case No. A792482.) Probation was revoked in his 1985 assault with a firearm case (No. A091718), and the trial court imposed a three-year term of imprisonment. In 1996 and 1998, appellant was returned to state prison for parole

violations after new arrests. In 2000, he was convicted of misdemeanor possession of narcotics paraphernalia and granted probation. In 2001, he was convicted of petty theft with a prior conviction and second degree burglary and committed to state prison for five years. (Case No. RIF099525.) Following his release on parole, he was returned to state prison a number of times for parole violations.

In the probation report, the probation officer indicated that appellant had a long history of criminal offenses, not all of which were drug-related, and that appellant is a career criminal.

### ***B. The Information***

The information alleged the following prior convictions constituting strikes within the meaning of the Three Strikes law: (1) a 1985 conviction of assault with a firearm, (2) a 1987 conviction of kidnapping, and, (3) a 1987 conviction of assault by means of force likely to produce great bodily injury and with a deadly weapon. The latter two convictions arose from the same case, No. A792482.<sup>4</sup>

The information made five allegations of the service of separate prison terms within the meaning of section 667.5, subdivision (b). It alleged the prior convictions above, as well as appellant's 2001 conviction of petty theft with a prior conviction and his 1971 conviction of "burglary."

### ***C. The Bifurcated Jury Trial on the Prior Convictions***

The trial court held a bifurcated jury trial on the allegations of prior convictions. As proof of the prior convictions, the prosecutor submitted a certified section 969b package that purported to be appellant's. The fact of the prior convictions was submitted to the jury on the four abstracts of judgment contained in the section 969b package. The

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<sup>4</sup> We will use the term "strike" to describe a prior felony conviction that qualifies a defendant for the increased punishment specified in the Three Strikes law, i.e., a "violent" or "serious" felony respectively, within the meaning of sections 667.5, subdivision (c) and/or 1192.7, subdivision (c). (See *People v. Fuhrman* (1997) 16 Cal.4th 930, 932, fn. 2.)

abstracts of judgment established that appellant had six prior felony convictions, only five of which were alleged: (1) a 1971 “burglary” conviction in case No. 7267; (2) a 1985 assault with a firearm conviction in case No. A091718; (3) 1987 kidnapping and felonious assault convictions in case No. A792482; and (4) a 2001 second degree burglary and petty theft with prior convictions in case No. RIF099525. (The 2001 prior felony conviction of burglary in case No. RIF099525 was not alleged in the information nor was it submitted to the jury.)<sup>5</sup>

The People presented testimony from a latent fingerprint expert to the trial court, and the trial court found that appellant was the person who had suffered the above five prior convictions.

#### ***D. Appellant’s Romero Motion***

In his written *Romero* motion, appellant requested that the trial court exercise its discretion to strike all the findings of strikes and sentence him pursuant to sections 1170 and 1170.1 so that he would be eligible for a grant of formal probation and enrollment in a drug treatment program. In the alternative, appellant requested that the trial court strike all allegations of a strike and impose a lower or middle term of imprisonment. Appellant urged that the exercise of discretion was reasonable as his conviction involved only 0.33 grams net of base cocaine.

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<sup>5</sup> The jury’s verdict made findings of the truth of four prior felony convictions for which there was no five-year wash-out period. After the jury made the findings on the prior convictions, the prosecutor wanted to amend the date for the 2001 conviction. The trial court indicated that it did not ask the jury to make a finding concerning whether the People had proved there was no five-year wash-out period following appellant’s 1971 prison commitment. It told the prosecutor it could have the jury retire again and make a proper finding with respect to the date of the conviction. But it “probably was not going to do much with the 28-year-old prior anyway.” Then it told the prosecutor that it was just going to “leave it alone for now.” The probation report indicates that appellant had served a separate prison term after his 1971, 1987, and 2001 convictions, and his 1985 and 1987 convictions resulted in the service of one separate prison term.

### ***E. The Sentencing Proceedings***

At sentencing, the trial court read and considered the *Romero* motion and appellant's probation report.

Trial counsel argued that appellant's current conviction was relatively minor; the 1985 and 1987 strikes were remote in time as they were respectively, 22 and 21 years old; recently, he had suffered only two further minor criminal convictions; and, he was on parole at the time of his arrest.

At the outset of the hearing, the trial court made the following findings: "First of all, even though the People proved up at trial two prior violations, the—well, arguably three. I guess he went to prison in '85 and '87, but that was just one prison commitment. They proved that the 1971 459 then not as a strike, but as a [prison] prior. They proved up the 2001 petty with a prior, the 666." It then observed that throughout the case, the People had proceeded on the assumption that appellant should be sentenced as a second-strike offender.

The trial court told counsel that it intended to strike the 1971 allegation of a separate prison term, and the People had no objection due to age of that conviction. The trial court said that the primary issue confronting it was whether, pursuant to appellant's *Romero* motion, it should also strike appellant's 1985 and 1987 prior convictions so as to make appellant eligible for a grant of probation.

It recited the relevant legal principles a trial court must use to determine a *Romero* motion.

The trial court acknowledged that the current offense was mitigating as it involved only a small quantity of base cocaine—0.33 grams net.

It then recited the large number of aggravating considerations. In 1985, appellant was convicted of assault with a firearm and granted probation. Thereafter, in 1986, he was arrested for assault with a deadly weapon, kidnapping by force for purposes of rape, and rape in concert. He was sentenced to state prison in 1987 for kidnapping and felonious assault and committed to state prison for 18 years. Upon his sentencing in

1987, probation was violated in the 1985 case, and appellant was committed to state prison concurrently for that conviction. In prison, appellant was arrested for an assault on another prisoner, an offense that was not prosecuted.

The trial court pointed out that after appellant was paroled, he was arrested in 1996 for another assault with a deadly weapon. In 1998, he was arrested for petty theft with a prior. These arrests resulted in parole violations and imprisonment, but appellant was not prosecuted. In 2001, appellant was arrested for a burglary that was resolved as a petty theft with a prior, and he was sentenced to a five-year prison term.

The trial court said that essentially, appellant had spent most of the last 20 years in state prison. His 1987 convictions indicated that he had committed extremely serious offenses of sexual assault and violence. It concluded that when the nature of appellant's criminal history was considered along with his character and prospects, appellant fell "within the meaning of the Three Strikes law at least with respect to" treatment as a second-strike offender.

Trial counsel informed the trial court that appellant was ineligible for Proposition 36 drug treatment. She urged that nevertheless appellant should be given the opportunity to obtain residential drug treatment by being placed on probation. She told the trial court that the parole authorities had not placed a parole hold on appellant, which signaled they were amenable to probation and drug treatment. She urged that appellant was probably "old enough" and "tired enough" to "get[] clean this time."

The trial court replied that appellant's prior convictions and prison and parole history were too serious to warrant sentencing him as a first-time offender. If appellant was struggling with drug addiction, he could have requested drug treatment from his parole officer. It appeared that he had failed to take advantage of that opportunity. Appellant showed no remorse as he had claimed throughout the case that he was innocent, and the jury had rejected his version of the events. The trial court said that it had concluded appellant was unlikely to be successful in drug rehabilitation. It told trial counsel that when appellant committed this offense, appellant was well aware that he had

two or three prior strikes, “depending on how you look at it already, and he should have” known that committing a new offense would result in a harsh prison sentence.

Trial counsel continued arguing for probation. Counsel pointed out that appellant had requested a trial only because he was attempting to obtain drug treatment. However, before trial, he was only offered imprisonment.

The trial court repeated that appellant’s situation failed to warrant striking all his prior convictions, and appellant was accordingly ineligible for probation.

The prosecutor requested a doubled, middle term sentence, plus the imposition of all applicable one-year enhancements. It asked the trial court to consider that appellant had testified and that the jury did not believe his testimony. Also, appellant was not “cooperative throughout these proceedings with the court and its process.”

The trial court told the prosecutor that it was not punishing appellant for going to trial.

The trial court ruled on the *Romero* motion. It said: “It seems to me the appropriate sentence is to strike the 1971 strike the People proved up at trial and the jury found true. The ‘85 and ‘87 strike, we’ll treat that as one. So it seems to me the appropriate sentence is a mid[dle] term of two years doubled plus one year for the 2001 prior. And I would stay any other priors 654. So the total [term of imprisonment will] be five years.”

Appellant personally complained that he had not been informed of any plea offer involving the striking of all the strikes. The trial court replied that there had been no such plea offer. Appellant asked why he could not be enrolled in “a program.” The trial court said: “Because you have a strike that was found to be true by the jury. Actually, you have several strikes, but I’m striking one of them.” It clarified that the jury had found true his 1985 and 1987 prior convictions. It explained that because of “those strike prior[s], you are [in]eligible for probation,” and the trial court could not enroll him in a program unless he was eligible for probation.



The trial court proceeded with sentencing. It imposed a middle term of two years, which was doubled pursuant to the Three Strikes law, making the base term four years in state prison.

Appellant personally protested that the trial court had explicitly told the jury that his trial did not involve the Three Strikes law. The trial court explained that appellant was not being sentenced to a Three Strikes term of 25 years to life. The trial court was “striking one of the strikes.” Appellant said, “But in the ‘71 case I was clean for five years.” The trial court replied, “I understand, and I struck your ‘71 case, but the strike is for 1994.”<sup>6</sup>

The trial court then finished sentencing. It enhanced the four-year base term with a one-year term for the service of a separate prison term following the 2001 conviction for petty theft with a prior.

## **DISCUSSION**

Appellant contends that the trial court abused its discretion in determining whether to strike prior convictions pursuant to *Romero* and that he is entitled to a remand to have the trial court consider his *Romero* motion and for resentencing.

Specifically, appellant argues that the evidence supports a finding only of one prior serious felony conviction—the 1987 kidnapping conviction—that constitutes a strike pursuant to the Three Strikes law. He urges that the trial court also regarded his 1971 “burglary” conviction as a strike when that conviction was not proven to be a violent or serious felony. The 1971 conviction was also never alleged in the information as a strike. His 1985 and 1987 assault convictions did not constitute strikes as there was no trial evidence demonstrating that he had committed these offenses with the personal use of a deadly or dangerous weapon or a firearm. He asserts that when the trial court

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<sup>6</sup> We assume that the trial court was referring to appellant’s 2001 conviction, which was the basis for the one-year prison term enhancement that was imposed.

ruled on his *Romero* motion, it misapprehended his situation because it believed that he had as many as four strikes, when he actually only had one.

Upon review, we conclude that the trial court failed to exercise properly informed discretion in connection with the *Romero* motion. Further, it failed to make formal findings as to: (1) whether three of the prior convictions were serious or violent felonies and qualified as strikes; and (2) how many separate prison terms appellant served following his five prior convictions. Though not specifically raised by appellant, we note that the trial court equated prior prison term enhancements with strikes, it ordered two prior prison term enhancements stayed even though they should have been stricken, and it did not clearly state for the record which prior convictions it was striking and the reasons for dismissal. This matter must be remanded for resentencing.

#### ***A. The Relevant Legal Principles***

Section 1385, subdivision (a), permits a trial court on its own motion to strike prior felony conviction allegations in cases brought pursuant to the Three Strikes law. (*Romero, supra*, 13 Cal.4th at p. 530.) “A court’s discretion to strike prior felony conviction allegations in furtherance of justice is limited. Its exercise must proceed in strict compliance with section 1385(a), and is subject to review for abuse.” (*Ibid.*) “[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

When a trial court considers a defendant’s motion to dismiss the allegation of a prior conviction pursuant to the Three Strikes law, it must ask “‘whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.’” (*People v. Carmony, supra*, 33 Cal.4th at p. 377, citing *People v. Williams* (1998) 17 Cal.4th 148, 161.)

A trial court abuses its discretion when it fails to consider relevant factors. (See *In re John F.* (1983) 150 Cal.App.3d 182, 184–185; *Visco v. Abatti* (1983) 144 Cal.App.3d 904, 907–908.) “To exercise the power of judicial discretion, all material facts and evidence must be both known and considered, together with legal principles essential to an informed, intelligent and just decision.” (*People v. Davis* (1984) 161 Cal.App.3d 796, 804.) A trial court is not exercising its “informed discretion” when it bases its sentence on misinformation regarding a material aspect of a defendant’s record. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8; *People v. Ruiz* (1975) 14 Cal.3d 163, 168.)

### ***B. The Decision in People v. Delgado***

In *People v. Delgado* (2008) 43 Cal.4th 1059 (*Delgado*), the Supreme Court addressed an issue concerning the proper procedure in determining a strike where the prosecutor uses a section 969b package to prove that the alleged prior convictions constitute violent or serious felonies. It observed that the offense proscribed in section 245, subdivision (a)(1), punishes assault committed either by means of force “‘likely to produce great bodily injury’” (GBI) or by the use of a “‘deadly weapon . . . other than a firearm.’” Only the latter version qualifies as a serious felony pursuant to section 1192.7, subdivision (c).<sup>7</sup> (*Delgado, supra*, at pp. 1063, 1065.) The issue in *Delgado* was whether a court clerk’s notation in the abstract of judgment as to the nature of the section 245 violation alone—“Asslt w DWpn”—constituted sufficient evidence to support the trial court’s finding of a prior serious felony conviction.

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<sup>7</sup> Section 1192.7, subdivision (c), does not include a violation of section 245 as an enumerated felony. Rather, it provides for conduct that may qualify a particular conviction as a prior serious felony conviction. Section 1192.7 provides in pertinent part, as follows: “(c) As used in this section, ‘serious felony’ means any of the following: . . . (23) any felony in which the defendant personally used a dangerous or deadly weapon; . . . (31) assault with a deadly weapon, firearm, . . . in violation of Section 245 . . .”

The court explained the following. The “‘trier of fact is entitled to draw reasonable inferences from certified records offered to prove a defendant suffered a prior conviction . . . .’ [Citations.] ‘[O]fficial government records clearly describing a prior conviction presumptively establish that the conviction in fact occurred, assuming those records meet the threshold requirements of admissibility. (See Evid. Code, § 664 [“It is presumed that official duty has been regularly performed].”) Some evidence must rebut this presumption before the authenticity, accuracy, or sufficiency of the prior conviction records can be called into question.’ [Citation.]

“Thus, if the prosecutor presents, by such [certified prison] records, *prima facie* evidence of a prior conviction that satisfies the elements of the recidivist enhancement at issue, and if there is no contrary evidence, the fact finder, utilizing the official duty presumption, may determine that a qualifying conviction occurred. [Citation.]” (*Delgado, supra*, 43 Cal.4th at p. 1066.)

However, “if the prior conviction was for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense. [Citations.] In such a case, if the statute under which the prior conviction occurred could be violated in a way that does not qualify for the alleged enhancement, the evidence is thus insufficient, and the People have failed in their burden. [Citations.]” (*Delgado, supra*, 43 Cal.4th at p. 1066.)

The *Delgado* court concluded that the descriptions of a crime found in the abstract of judgment are reliable indicators of the nature of the offense of which a defendant has been convicted. (*Delgado, supra*, 43 Cal.4th at pp. 1070–1072.) It also discussed three other Court of Appeal decisions that had previously addressed similar issues.

The Supreme Court then applied the usual standard of review for sufficiency of the evidence to the abstracts of judgment submitted as proof to the *Delgado* trial court. (*Delgado, supra*, 43 Cal.4th at p. 1067.) It held that the description of the felonious assault conviction in the abstract of judgment as a violation of section 245, subdivision

(a)(1) and “Asslt w DWpn” unambiguously provided prima facie proof that the assault was committed with deadly weapon. (*Delgado, supra*, at p.1069.) The court noted that at trial, the defendant did not attempt to rebut such proof. Accordingly, the *Delgado* court found that the clerk’s notation was sufficient to support the trial court’s finding of a prior serious felony conviction. It explained: “The People therefore presented prima facie evidence, in the form of a clear, presumptively reliable official record of defendant’s prior conviction, that the conviction was for the serious felony of assault with a deadly weapon. Defendant produced no rebuttal evidence. Utilizing the presumption of official duty, and drawing reasonable inferences from the official record, the trial court, as a rational trier of fact, could thus properly find beyond reasonable doubt that a prior serious felony conviction had occurred.” (*Id.* at p. 1070.)<sup>8</sup>

### ***C. The Analysis***

Appellant’s contention is partially flawed as it relies on section 1192.7 as it existed prior to 2000. Prior to 2000, section 1192.7, subdivision (c), contained only one provision that had the potential of qualifying a prior conviction of felonious assault as a serious felony, subdivision (c)(23): “any felony in which the defendant personally used a dangerous or deadly weapon.” That provision requires the prior offense be committed with the personal use of the deadly or dangerous weapon before a prior conviction may qualify as a serious felony, and here, as a strike.

However, on March 7, 2000, the voters adopted Proposition 21, which added the following provision to section 1192.7, subdivision (c): “(31) assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm . . . .” The new provision, which applies specifically to the offense of felonious assault, eliminated the

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<sup>8</sup> The Supreme Court also decided a companion case, *People v. Miles* (2008) 43 Cal.4th 1074, at the same time as *Delgado*. In *Miles*, the court addressed the issue of whether the clerk’s notations in a federal abstract of judgment concerning bank robbery demonstrated a California prior serious felony conviction. The decision in *Miles* is not helpful to the resolution in our case.

requirement of the personal use of the weapon or firearm. As the felonious assault proscribed in section 245, subdivision (a)(1), can be committed without the use of a deadly weapon, as well as with one, the People are still required to prove that the particular felonious assault was committed with the use of a deadly weapon.<sup>9</sup> But prior convictions of assault with a firearm pursuant to section 245, subdivision (a)(2), are now specifically enumerated as a serious felony and a strike.

Also, the California Supreme Court implicitly overruled the decision in *People v. Shirley* (1993) 18 Cal.App.4th 40, 44-45, when it rendered the above decision in *Delgado, supra*, 43 Cal.4th 1059.

The instant section 969b package contained four abstracts of judgment. The 1971 abstract of judgment in case No. 7267 described appellant's conviction as "Burglary" in violation of "Section 459." The 1985 abstract of judgment in case No. A091718 indicated that appellant was convicted of "245(a)(2)" "ASLT w/Firearm/On/PER." The 1987 abstract of judgment also indicated that in case No. A792482, appellant was convicted of "207(A)" "Kidnapping" and "245(a)(1)" "[text unclear]/FIREARM." The 2001 abstract of judgment in case No. RIF099525, indicated that appellant was convicted by plea of "666" "petty theft w/pr" and "459" "2nd Burglary."

Following the analysis in *Delgado*, the clerk's notation in the abstracts of judgment are sufficient to support trial court findings that the kidnapping offense and at least one prior conviction of felonious assault constituted strikes. The notations in the clerk's transcripts indicate that the 1985 and 1987 felonious assaults were committed by the use of a firearm, albeit the notation in the 1987 abstract of judgment concerning the assault conviction is partially illegible and the notation "FIREARM" conflicts with a

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<sup>9</sup> Section 245 subdivision (a)(1), provides that it is a felony offense to "commit[] an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury." Section 245, subdivision (a)(2), provides that it is a felony offense to "commit[] an assault upon the person of another with a firearm . . ."

violation of section “245 (a)(1).” Given the above evidence, however, it was up to the trial court to determine whether the clerk’s notations concerning the nature of the 1987 felonious assault provided sufficient evidence to prove a strike.

After the jury made true findings on the prior convictions, the trial court failed to enter formal findings on whether three of the prior convictions alleged were serious or violent felonies and thus strikes. (§ 1158; *People v. Kelii* (1999) 21 Cal.4th 452, [the trial court makes the legal determination of whether a prior conviction is violent or serious felony and thus is a strike].) It also failed to make formal findings on how many separate prison terms appellant had served following the five prior convictions found true by the jury. (See *People v. James* (1978) 88 Cal.App.3d 150, 161.) The trial court’s informal comments are conflicting on its findings of strikes. It is impossible to tell whether the trial court found two or three of the 1985 and 1987 prior convictions to be strikes. The trial court also apparently mistakenly believed that the 1971 burglary conviction was a strike even though it was neither alleged nor proved to be one.

There are errors that further cloud the record. By referring to the 1971 burglary conviction as a “strike” and treating the 1985 and 1987 prior convictions as one “strike,” the trial court suggests that it conflated the requirements for the section 667.5 prior prison term enhancements with the finding of strikes. (See *People v. Fuhrman*, *supra*, 16 Cal.4th at p. 933 [a prior qualifying conviction need not have been brought and tried separately]; *People v. Benson* (1998) 18 Cal.4th 24, 36 & fn. 8 [even strikes arising from the same case, but ordered stayed are to be treated as separate prior convictions, subject to the trial court’s section 1385 exercise of discretion].) The 1971 burglary conviction could not serve as the predicate for a separate prison enhancement as the trial court failed to ask the jury to make a finding on the five-year wash-out period. (E.g., *People v. Nobleton* (1995) 38 Cal.App.4th 76, 84–85.) And, the trial court ordered two of the separate prison term enhancements stayed pursuant to section 654, when section 654 does not apply. These prior convictions should have been ordered stricken, not stayed.

(*People v. Jordan* (2003) 108 Cal.App.4th 349, 368 [prior prison terms may be imposed or stricken but not stayed].)

Moreover, the trial court failed to comply with section 1385, subdivision (a), by clearly stating which prior convictions it was striking and by including in its minutes “the reasons for the dismissal.” (*Romero, supra*, 13 Cal.4th at pp. 531–532 [a statement of reasons is necessary to strike strikes]; *People v. Jordan, supra*, 108 Cal.App.4th at pp. 368–369 [a statement of reasons is required for striking prior prison term enhancements].)

The record establishes that when the trial court ruled on the *Romero* motion, it was not exercising informed discretion. Its comments during the *Romero* motion and at sentencing reveal that the exercise of discretion was based on misinformation as to at least one material aspect of appellant’s criminal history. The trial court employed erroneous legal theories to determine the existence of strikes. No reasonable trial court would have granted appellant probation. But a reasonable trial court might have granted appellant leniency, found that he fell outside the spirit of the Three Strikes law, and sentenced him to state prison as a first-time offender. The appropriate remedy for the abuse of discretion is a remand for resentencing.

On remand, the trial court shall render formal findings as to whether the alleged strikes are serious felonies and strikes in conformity with the decisions in *People v. Kelii, supra*, 21 Cal.4th 452 and *Delgado, supra*, 43 Cal.4th 1059. It shall make formal findings on the service of a separate prison terms and either impose or strike each separate prison term enhancement. If the trial court strikes prior convictions pursuant to *Romero*, or strikes the separate prison term enhancements pursuant to section 1385, it shall place in its minutes the reasons for its exercise of discretion.

We do not suggest in this opinion how the trial court should exercise its discretion on remand in ruling on the *Romero* motion.<sup>10</sup>

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<sup>10</sup> In the petition of habeas corpus, appellant made a claim of cruel and unusual punishment. On remand, if he wishes, he may raise that claim at resentencing.



## DISPOSITION

The orders of sentencing are reversed. On remand for resentencing, the trial court shall make formal findings as to the truth of the section 667, subdivisions (b) through (i) and section 1170.12 allegations of strikes, as well as formal findings on the existence of the section 667.5, subdivision (b) separate prison term enhancements. It shall also redetermine appellant's *Romero* motion in conformity with the views expressed above and resentence appellant. In all other respects, the judgment will be affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

\_\_\_\_\_, J.

ASHMANN-GERST

We concur:

\_\_\_\_\_, P. J.

BOREN

\_\_\_\_\_, J.

DOI TODD